FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554
MAY 23 2005

OFFICE OF
MANAGING DIRECTOR

Howard M. Liberman, Esq.
Drinker, Biddle & Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005-1209

Re: Primosphere Limited Partnership
Request for Refund of Satellite Launch and Operation Fees
Fee Control No. 9301158160318001

Dear Mr. Liberman:

This is in response to your request dated July 9, 2004, filed on behalf of Primosphere Limited Partnership (Primosphere) for a refund of the satellite digital audio radio service (satellite DARS or SDARS) system launch and operation authority application fees. Our records reflect that you paid the $140,000.00 application fees at issue here.

In November 1992, the Commission proposed to allocate 50 MHz of spectrum for satellite DARS.[1] Primosphere applied for authority to provide SDARS in December of 1992 and paid the associated application fees in January of 1993.

In 1995, the Commission allocated 50 MHz of spectrum for SDARS[2] and proposed service and licensing rules for the service.[3] In subsequently enacted legislation, Congress directed the Commission to reallocate 25 MHz of the 50 MHz of spectrum originally allocated for satellite DARS spectrum for any services consistent with the allocation table and associated international agreements.[4] Given the reallocation directive, the Commission in March 1997 determined that it would designate only two

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[1] *Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services,* Notice of Proposed Rule Making and Further Notice of Inquiry, 7 FCC Rcd. 7776 (1992).

[2] *Amendment of the Commission's Rules with Regard to the Establishment and Regulation of New Digital Audio Radio Services,* Report and Order, 10 FCC Rcd. 2310, 2315 (1995) (*Allocation Order*).

[3] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band,* Notice of Proposed Rulemaking, 11 FCC Rcd 1, 11-13 (1995) *(NPRM)*.

[4] Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, 110 Stat. 3009 (1996) (*Appropriations Act*).

licenses for SDARS in the remaining 25 MHz allocated for SDARS and that it would award both SDARS licenses by auction.[5] The Commission limited participation in the auction (which took place on April 1 and April 2, 1997) to the four remaining pending applicants that had filed before the filing cut-off date, i.e., Primosphere, Satellite CD Radio, Inc. (CD Radio), Digital Satellite Broadcasting Corporation (DSBC), and American Mobile Radio Corporation (AMRC). All four participated, and AMRC and CD Radio submitted the winning bids. In October 1997, the Commission's International Bureau issued authorizations to AMRC and CD Radio to launch and operate the satellite DARS systems[6] and dismissed Primosphere's and DSBC's applications.[7]

In your request, you maintain that the Commission performed no substantive review of Primosphere's application for launch and operation authority and that the fees paid for such authority "bear little relationship to any cost of processing the application." You claim that DSBC and Sky-Highway Radio Corporation (Sky-Highway), an applicant that withdrew earlier in the proceeding, are applicants similarly-situated to Primosphere in that they paid the launch and operation fees for satellite DARS at the same time as Primosphere and that they received "full refunds" of their fees.[8]

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[5] *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band,* Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5754 (1997) (*Report and Order*).

[6] *See American Mobile Radio Corporation Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, DA 97-2210 (released October 16, 1997); *Satellite CD Radio, Inc. Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, DA 97-2210 (released October 10, 1997).

[7] Primosphere appealed the grants of the two winning applications to the Commission and to the United States Court of Appeals for the District of Columbia Circuit, which affirmed both grants. Primosphere also filed a petition for reconsideration of the International Bureau's dismissal of Primosphere's application, which the Bureau denied. *Primosphere Limited Partnership,* 13 FCC Rcd 8976 (International Bur. 1997), *recon. denied*, 16 FCC Rcd 21175 (International Bur. 2001). Primosphere filed an application for review of that denial, which Primosphere withdrew in April of 2004.

[8] *See* Letter from Marilyn J. McDermett, Associate Managing Director for Operations, Office of Managing Director (OMD), to Mr. Lawrence F. Gilberti (dated Apr. 11, 1994), 9 FCC Rcd 2223, 2240-41 (OMD 1994) (*Sky-Highway Letter Decision*); and *Public Notice, Fee Decisions of the Managing Director Available to the Public*, 15 FCC Rcd 8636, 8636 (Mar. 14, 2000) (*DSBC Letter Decision*).

You further contend that Primosphere is entitled to a refund under section 1.1113(a)(4) of the Commission's rules, 47 C.F.R. §1.1113(a)(4),[9] because "Congress and the Commission adopted new laws and rules affecting the viability of Primosphere's application[.]" You argue that until Congress "stripp[ed]" 25 MHz of spectrum from the allocated spectrum, "it was reasonabl[e] to assume that each applicant would receive a license[.]" You state that the "reduced spectrum" under the regulations adopted in 1997 in the *Report and Order* "created mutual exclusivity among the four DARS applicants" and the Commission's decision to hold an auction to resolve the mutual exclusivity "created a situation whereby only two of the existing DARS applications could be granted." Finally, noting that Primosphere submitted its application and fees at a time when satellite DARS was in "preliminary developmental stages[,]" you assert that a refund would encourage others "to participate in the early stages of development of new technologies thereby generating a higher quality of information and increas[ed] competitiveness[.]"

The Commission has discretion to waive filing fees upon a showing of good cause and a finding that the public interest will be served thereby.[10] We construe our waiver authority under section 8 of the Communications Act, 47 U.S.C. §158(d)(2), narrowly and will grant waivers on a case-by-case basis to specific applicants upon a showing of "extraordinary and compelling circumstances."[11]

As an initial matter, we find that Primosphere's request for waiver of the application fees is grossly untimely because it was not filed until July 9, 2004, nearly seven years after Primosphere's application was dismissed in October of 1997. On this basis alone, we find that your request does not provide a basis for relief or otherwise warrant any further consideration.[12]

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[9] Section 1.1113(a)(4) provides that the Commission will refund application fees "[w]hen the Commission adopts new rules that nullify applications already accepted for filing, or new law or treaty would render useless a grant or other positive disposition of the application."

[10] *See* 47 U.S.C. §158(d)(2); 47 C.F.R. §1.1117(a); *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 5 FCC Rcd 3558, 3572-73 (1990).

[11] *See Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 958, para. 70 (1987); *Sirius Satellite Radio, Inc.*, 18 FCC Rcd 12551 (2003).

[12] *See* Letter from Mark A. Reger, Chief Financial Officer (CFO), OMD, FCC, to C. Michael Curry, Vice President, Hispanic Keys Broadcasting Corp (dated Aug. 27, 2002) (denying untimely request for regulatory fee relief for FYs 1997, 1998, and 1999 because the request was filed on March 14, 2002, "long after the fiscal years in question"); Letter from Mark A. Reger, CFO, OMD, FCC, to Rodney L. Joyce, counsel for Network Access Solutions Corporation (Aug. 11, 2004) (denying untimely request for regulatory fee relief for FYs 2000 and 2001 because the request was filed on April 2, 2004, "long after the

Even if your request for relief was timely, we find that you have failed to establish good cause for waiver of the application fees. First, we disagree with your assertion that Primosphere's fees should be refunded because the Commission's review of Primosphere's application "bears[s] little relationship" to the costs of processing the application. It is well established that "there is 'no justification in the statute or legislative history for apportioning fees in accordance with the actual work done on any particular application.'"[13] Thus, Congress and the Commission have made clear that the existence of "compelling and extraordinary circumstances" – not the amount of resources expended in an individual case – should be the touchstone for determining whether a refund should be granted. The *Sky-Highway Letter Decision*, upon which you rely, is unavailing. In that decision, OMD noted that "it was cognizant that the fees submitted bear scant relationship to the resources that the Commission has expended to date on the processing of these applications[.]"[14] OMD found "good cause" to refund fees it found "unduly excessive" where processing of the applications would in all likelihood be deferred until the adoption of service rules and where the applicant's construction permit applications "were in a preliminary processing stage at the time it withdrew."[15] *PanAmSat* makes clear, however, that good cause for a fee refund cannot be shown merely by demonstrating that the amount of the fee "bears scant relationship" to the resources expended in an individual case; rather, it is incumbent upon the applicant to demonstrate

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fiscal years in question"). Primosphere's dismissal in 1997 was effective upon release of the Bureau's order. Although Primosphere sought reconsideration, it did not seek or obtain a stay of its dismissal or otherwise claim to preserve its right to request a refund. *See* 47 U.S.C. §405(a); 47 C.F.R. §1.102(b). By contrast, DSBC filed its request for refund on January 21, 1999.

[13] *PanAmSat Corporation*, 19 FCC Rcd 18495, 18498 (2004) (*PanAmSat)*; *see also id.* at 18497 ("consistent with congressional intent and established precedent, application fees are not adjusted to reflect the actual work done on any particular application"); *see also Lockheed Martin Corp.*, 16 FCC Rcd 12805, 12807 (2001); *see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985,* 2 FCC Rcd 947, 949 (1987) (stating that "processing costs were but one factor in the rough calculus that resulted in the legislated fees"); *see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1985,* 3 FCC Rcd 5987, para. 5 (1988) (recognizing that "the amount of a fee represents the Commission's estimate, accepted by Congress, of the average cost to the Commission;" declining to "make individualized determinations of the 'appropriate fee,'" although the actual cost may be more or less in individual situations; and indicating an intent to "levy the fee as determined by Congress . . . except in unusual cases in which the public interest requires otherwise.").

[14] *Sky-Highway Letter Decision*, 9 FCC Rcd at 2241.

[15] *Id.*

the existence of "compelling and extraordinary circumstances." Primosphere has not demonstrated that such circumstances exist here.[16]

In addition, we disagree that Primosphere is entitled to a refund based on the *DSBC Letter Decision* issued in 2000. There, OMD issued a 90 percent refund of DSBC's application fee because of "the unique situation in which DSBC was placed when the decision to auction the DARS licensees [*sic*] occurred during the processing of its application." In retrospect, we find that the circumstances facing the applicants when the Commission decided to auction the DARS spectrum were not unique nor were they sufficiently compelling or extraordinary so as to warrant a refund of the regulatory fees under the Commission rules. The decision, moreover, was inconsistent with prior Commission decisions not to refund fees in analogous circumstances. When the DARS applicants filed their launch and operation applications in 1992 and the associated fees in 1993, the Commission, although it had not yet adopted licensing rules for SDARS, had the authority under section 309(j) of the Communications Act, as amended, 47 U.S.C. §309(j) (1992, 1993), to license satellite DARS by auction. In 1995, while the SDARS applications remained pending, the Commission proposed for public comment three licensing options for SDARS, two of which included licensing by auction.[17] The licensing of SDARS by auction was therefore a possibility as early as 1992 and a proposed licensing option in 1995. When the Commission adopted its licensing plan in 1997, it described it as "a logical outgrowth" of option two (*see supra* n.17).[18] We therefore find that the Commission's decision to auction the SDARS licenses was not sufficiently compelling so as to warrant a refund of the fees. Moreover, although the SDARS *Report and Order* was silent as to whether application fees would be refunded to applicants who did not receive authorizations, contemporaneous Commission rulemakings in other service areas in which the Commission addressed the same issue

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[16] The *Sky-Highway Letter Decision* is also factually distinguishable because, unlike Sky-Highway, Primosphere pursued the prosecution of its application through the development of the SDARS rules and the auction process until its dismissal.

[17] *See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band,* Notice of Proposed Rulemaking, 11 FCC Rcd 1, 11-13 (1995) *(NPRM).* Under the first option, the Commission would assign the entire 50 MHz of spectrum allocated for satellite DARS to the four remaining applicants that had filed prior to the cut-off date. Under the second option, the Commission would designate less than the full amount of useable spectrum for satellite DARS to the pending applicants and would award the remaining spectrum to new applicants. If either of the two band segments (one for pre-cut off applicants and one for new applicants) could not accommodate all applicants, the Commission would resolve mutual exclusivity via competitive bidding. Under option three, the Commission would reopen the cut-off filing date for satellite DARS applications and allow additional applicants to file proposals for all of the useable satellite DARS spectrum and, in the event of a mutually exclusive situation, auction all licenses.

[18] *See Report and Order* at 5771.

uniformly indicate that refunds will only be permitted where applicants elect not to participate in the auction process.[19] Therefore, we specifically decline to follow the reasoning of the *DSBC Letter Decision* in this or future cases.

We also reject your contention that Primosphere is entitled to a refund of the application fees under section 1.1113(a)(4) of the rules, which requires the return of an application fee when the Commission adopts new rules that nullify an application that has been accepted for filing. In establishing the fee collection program, the Commission explained that

> [s]ection 1.1111(a)(4) [the earlier version of section 1.1113(a)(4)] is intended to apply in those rare instances where the Commission creates a new regulation or policy, or the Congress and President approve a new law or treaty, that would make the grant of a pending application a legal nullity. We believe that this rare event would justify the return of an application because the action of a government entity would make the requested action impossible without regard to the merits of that application.[20]

In this case, no new law, treaty, regulation, or policy made the grant of Primosphere's application (or any other satellite DARS application) a nullity. The Congressional directive reduced the available spectrum but did not preclude a grant to Primosphere. Rather, the Commission reallocated a portion of the spectrum previously allocated to satellite DARS and determined that two licenses would be awarded by auction. The Commission's decisions affected the licensing process and the available spectrum for satellite DARS, but did not affect the rules determining whether any given satellite

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[19] *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses,* First Report and Order, 13 FCC Rcd 15920, 15957-58 (1998) (no reason to refund fees to broadcast applicants choosing to participate in auction because they "have continued to prosecute their applications"); *Implementation of Section 309(j) – Competitive Bidding*, 9 FCC Rcd 7387, 7391-92 (1994) (if the Commission used competitive bidding procedures for cellular applications, those applicants indicating no desire to participate would be entitled to a refund of application processing fees); *accord Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding,* Report and Order, 10 FCC Rcd 9589, 9632 (1995) (if the Commission used competitive bidding for pending MDS applicants, those applicants indicating a desire not to participate may be entitled to refunds).

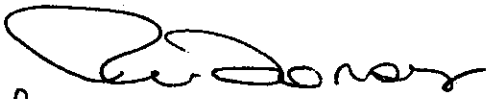
[20] *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985,* Report and Order, 2 FCC Rcd. 947, para. 17 (1987); *see also Ranger Cellular and Miller Communications, Inc.*, 348 F.3d 1044 (D.C. Cir. 2003), (upholding a Wireless Telecommunications Bureau decision citing this language).

DARS application could be granted on its merits or otherwise make the grant of Primosphere's application impossible under section 1.1113(a)(4) of the rules. Indeed, Primosphere had the same opportunity as the others to prevail in the auction.

You also assert that a refund would promote greater participation in the preliminary stages of development of new technologies and thereby generate a higher quality of information and competitiveness. This reasoning could apply to virtually any service, however, and therefore is not a sufficiently compelling reason to warrant a refund of the application fees mandated by section 8. We therefore find that Primosphere has not shown sufficiently extraordinary or compelling circumstances as to warrant a refund. Accordingly, we deny your request.

If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,



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July 9, 2004

Mr. Andrew S. Fishel
Managing Director
Federal Communications Commission
The Portals, TW-A325
445 Twelfth Street, SW
Washington, DC 20554

Re: Request for Return of Fees Paid by Primosphere Limited Partnership in Connection with File Nos. 29/30-DSS-LA-93 and 16/17-DSS-P-93

Dear Mr. Fishel:

Primosphere Limited Partnership ("Primosphere"), by it attorneys, hereby requests that the Commission refund launch and operation authority fees totaling $140,000.00 paid by Primosphere in connection with its above-referenced application to construct, launch and operate two satellites for the Digital Audio Radio Service (DARS).

There is ample justification for the Commission to grant this request. Based on precedent in the DARS proceeding itself, the general rule of non-refundability of application fees can be waived where there is a significant disparity between fees paid and work performed by the Commission.

The Commission also can return Primosphere's fees under a defined exception to the general rule of non-refundability which permits a return of fees upon the adoption of new laws or regulations when they affect a positive disposition of an application.[1] Primosphere is entitled to a return of its fees under this exception because Congress eliminated one-half of the spectrum available for DARS operations between the time the Commission began accepting applications for DARS systems and the time the Commission adopted rules for licensing the DARS spectrum. This reduction is spectrum created mutually exclusive applications and a Commission decision to auction the remaining spectrum.

In addition, two other similarly situated DARS applicants received full refunds of the launch and operation authority fees they paid at the same time Primosphere paid its fees.

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[1] 47 C.F.R. §1.1113(a)(4).

Background

In late 1992, the Commission accepted an application filed by Satellite CD Radio Inc. for authority to construct, launch, and operate a DARS system. Simultaneously, the Commission solicited additional applications for DARS systems, setting a submission closing date of December 15, 1992.[2] The Commission then issued a Public Notice requiring applicants for DARS spectrum to pay launch and operating authority fees for each requested satellite ($70,000.00 per satellite) on or before January 15, 1993. Failure to pay these fees on time would result in dismissal of the application.[3]

Primosphere timely filed its application with the Commission and paid the required fees – $4,060 for application fees and $140,000.00 for authority to launch and operate two satellites. (Primosphere is not requesting a refund of the $4,060 application fee.) On February 19, 1993, the Commission issued a public notice of the acceptance of Primosphere's application and the applications of four other applicants.[4] Two applicants subsequently withdrew their applications.[5] In November 1993, three of the remaining four DARS applicants notified the Commission that the four applications were not mutually exclusive and that all four proposed DARS systems could be accommodated in the 50 MHz allotted by the WARC for United States DARS operations.[6]

The Commission did not resume consideration of DARS rules and policies until January of 1995. During this interim, there was no processing of DARS applications regarding launch and operations authority. In January 1995, the Commission issued a *Report and Order* officially allocating spectrum for satellite DARS in the 2310-2360 MHz range.[7] Subsequently, in June 1995, the Commission issued a *Notice of Proposed*

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2 FCC Public Notice 30121 DA 92-1408 (Oct. 13, 1992).

3 FCC Public Notice 30918 DA 92-1666 (Dec. 9, 1992).

4 Digital Audio Radio Service Satellite System Applications Acceptable for Filing, 8 F.C.C.R. 986 (1993).

5 Sky-Highway Radio Corp., File Nos. 31/32-DSS-LA-93, and Loral Aerospace Holdings, Inc., File Nos. 14-DSS-P/LA-93 and 15-DSS-P-93.

6 See Joint Letter of CD Radio, Inc., Digital Satellite Broadcasting Corp. and Primosphere Limited Partnership, filed Nov. 17, 1993.

7 Amendment of the Commissions Rules with regard to the Establishment and Regulation of the New Digital Audio Radio Services, 10 F.C.C.R. 2310 (1995).

Rule Making to establish rules and policies for DARS in the allocated band.[8] The reply comment period for this Rule Making ended on October 13, 1995, but the Commission did not issue the *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making* governing DARS operations until March 3, 1997.[9] In the absence of rules and policies, the Commission had still taken no action to process the applications for launch and operation authority.

Meanwhile, in late 1996, in the Omnibus Consolidated Appropriations Act, Congress directed that portions of the previously reserved DARS spectrum be allocated for other services and licensed by competitive bidding.[10] This Act removed 25 MHz (one-half) of the spectrum previously allocated to DARS operations. Because of the loss of one-half of the previously assigned DARS frequencies, the Commission determined it could award only two DARS licenses.[11] Thus, for the first time, the four DARS applications were deemed mutually exclusive and the Commission, in its March 31, 1997 Report and Order, directed that an auction be held. The auction took place on April 1, 1997. Although Primosphere participated in the auction, two other applicants outbid Primosphere.

Primosphere appealed the International Bureau's grants of the applications of the two highest bidders, at first within the Commission and then to the U.S. Court of Appeals for the D.C. Circuit. Eventually, in February 2003, the Court of Appeals affirmed both grants. During this appeal period, the International Bureau dismissed Primosphere's DARS application; but Primosphere filed a Petition for Reconsideration, asking the Bureau to retain Primosphere's application in pending status, because if either of the two applicants that were the highest bidders in the auction was disqualified as a result of Primosphere's appeal of the grants, Primosphere's application then would have been eligible for grant. In November 2001, the Bureau denied Primosphere's Petition for Reconsideration; but Primosphere filed an Application for Review on December 21, 2001, asking the Commission to reverse this Bureau action. In April 2004, Primosphere filed a "Motion to Withdraw Application for Review," withdrawing its Application for Review of the International Bureau's dismissal of its DARS application.

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[8] Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 11 F.C.C.R. (1995).

[9] Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 62 Fed. Reg. 11083 (March 11, 1997) [hereinafter Establishment 1997].

[10] Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 §3001, 110 Stat. 3009 (1996).

[11] Establishment 1997 at para. 41.

Waiver of Attachment of Charges

The Commission imposes fees to recover the processing costs of submitted applications.[12] These fees normally are retained "irrespective of the Commission's disposition" of the application.[13] However, Congress has given the Commission leeway to "waive or defer payment of any charge in any instance for good cause shown, where such action would promote the public interest."[14] The Commission has stated that it will make determinations on a case by case basis and that those requesting a waiver bear the burden of providing overriding public interest.[15]

During the period between December of 1992, when Primosphere filed its DARS application, and April 1, 1997, when the DARS auction took place, the Commission took no action to evaluate Primosphere's request for launch and operation authority. The Commission could not begin consideration of Primosphere's application on its merits until the regulations governing DARS were adopted on March 3, 1997. Since Primosphere was not a successful bidder at the April 1, 1997 auction, the Commission never did perform substantive review of Primosphere's application and certainly not insofar as the application requested launch and operation authority. Consequently, the launch and operation authority fees paid by Primosphere bear little relationship to any cost of processing the application.

There is good cause for returning the $140,000.00 fees Primosphere paid with its launch and operation authority application, and the return of these fees would clearly be in the public interest. Primosphere submitted its application and fees at a time when DARS was in its preliminary developmental stages. The public interest would be served in returning these fees because it would encourage other persons and entities to participate in the early stages of development of new technologies thereby generating a higher quality of information and increasing competitiveness among those interested in providing the new service.

In addition, there is Commission precedent in this very proceeding for waiving excessive fees paid in association with satellite launch and operations applications. The Managing Director granted the request of Sky-Highway Radio Corporation ("Sky-

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[12] See Establishment of Fee Collection Program to Implement Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, 2 F.C.C.R. 947, 949 (1987) [hereinafter "Fees"].

[13] 47 C.F.R. §1.1108.

[14] 47 U.S.C. §158(d)(2).

[15] Fees, 2 F.C.C.R. at 961.

Highway") for return of its launch and operation authority fees when Sky-Highway withdrew it DARS applications in 1993. A copy of the April 11, 1994 letter from the Office of Managing Director, granting Sky-Highway's request, is attached hereto. Another applicant, Digital Satellite Broadcasting Corp. ("DSBC"), which like Primosphere participated in the DARS auction but did not prevail, asked for and received a refund of its launch and operation fee. Attached hereto is a copy of the Public Notice of that refund.

Primosphere is in a position similar to those of Sky-Highway and DSBC. In both cases, the Commission performed no significant review of the applications. It is of little significance that Sky-Highway withdrew its application in 1994, prior to the adoption of the DARS governing regulations on March 3, 1997, and Primosphere was an unsuccessful bidder in the SDARS auction. Once the Commission had determined that it would hold an auction, it was clear that no evaluations of requests for launch and operations authority would occur until after the auction, and then only of the winning applicants' applications. Thus the fees paid by Primosphere are just like the fees paid by Sky-Highway – "unduly excessive."

Return or Refund of Charges Based on the Operation of a New Law or Regulation

The Commission's rules state that "the full amount of any [application] fee will be refunded or returned . . . when the Commission adopts new rules that nullify applications already accepted for filing, or a new law or treaty would render useless a grant or other positive disposition of the application."[16] Pursuant to this provision the Commission should return Primosphere's launch and operation fees since both Congress and the Commission adopted new laws and rules affecting the viability of Primosphere's application for a DARS satellite system. When Primosphere submitted its application in late 1992, 50 MHz of spectrum was available for DARS services. By November, 1993, only three other entities continued to share an interest in utilizing the spectrum for DARS applications, reducing the likelihood of a mutual exclusivity problem. In fact, the applicants themselves resolved any mutual exclusivity problems.[17] Thus, until the Congressional action stripping 25 MHz of spectrum from the DARS allocation, it was reasonably to assume that each applicant would receive a license and that the launch and operation applications would, in fact, at some point, be processed. Once Congress acted, however, it became a virtual certainty that two applicants would not be successful.

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[16] 47 C.F.R. §1.1113(a)(4).

[17] Joint Letter, supra note 7.

Under the direction of Congress, the Commission issued the DARS licensing regulations with one-half the original spectrum available.[18] The reduced spectrum availability under the new regulations created mutual exclusivity among the four DARS applicants where none had previously existed. To resolve the mutual exclusivity, the Commission determined an auction would be in the best interests of the public, and would avoid unjust enrichment to the license winners.[19] This Commission action created a situation whereby only two of the existing DARS applications could be granted.

Conclusion

The facts and circumstances surrounding the development and implementation of DARS justify a return of Primosphere's launch and operation authority fees. Primosphere has shown good cause to return the fees it paid early in the DARS proceeding. Strict application of Section 1.108 would result in the payment of excessive fees which in turn would discourage future gambles on new technologies. Moreover, the new law and regulations enacted by Congress and the Commission nullified Primosphere's application, mandating a return of fees under the limited exception provided by Section 1.113(a) (4). Finally, two other similarly situated DARS applicants have received refunds of their launch and operation fees.

Should you have any questions regarding this request, please contact undersigned counsel for Primosphere Limited Partnership.

Very truly yours,

Howard M. Liberman

Howard M. Liberman

[18] Establishment 1997 at para. 3.

[19] Id at para. 152.